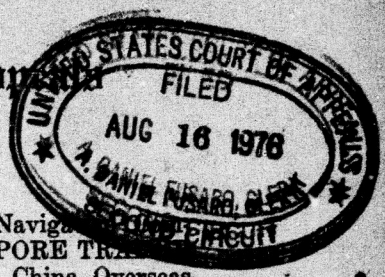
United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

75-7380



United States Court of Appeals

FOR THE SECOND CIRCUIT

In the Matter of the Complaint of Singapore Navigation Company, S.A., as owner of the Steamship SINGAPORE TRADER and China Marine Investment Co., Ltd. and China Overseas Navigation Co., Ltd., Plaintiffs, for exoneration from or limitation of liability.

SINGAPORE NAVIGATION COMPANY, S.A., CHINA MARINE INVESTMENT CO., LTD., CHINA OVERSEAS NAVIGATION CO., LTD.,

Plaintiffs-Appellants,

MEGO CORP., ET AL., JOSEPH MARKOVITS, ET AL., UNITY SEWING SUPPLY CO., ET AL., INTERNATIONAL SEAWAY TRADING CORP., ET AL., KATONE CORP., ET AL., SPARTAN INDUSTRIES, ET AL., ALSTER IMPORT CO., LO-E MANUFACTURING CORP.,

Cargo Claimants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING ON BEHALF OF PLAINTIFFS-APPELLANTS SINGAPORE NAVIGATION COMPANY, S.A., CHINA MARINE INVESTMENT CO., LTD., AND CHINA OVERSEAS NAVIGATION CO., LTD.

KIRLIN CAMPBELL & KEATING
Attorneys for Plaintiffs-Appellants
120 Broadway
New York, New York 10005

LAWRENCE J. BOWLES
RICHARD H. BROWN, JR.
Of Counsel

TABLE OF CONTENTS

	PAGE
The Proper Test	2
There Was No Deviation	3
If There Was a Deviation It Was Not Unreasonable	4
Limitation of Liability	9
Conclusion	10

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7380

In the Matter of the Complaint of Singapore Navigation Company, S.A., as owner of the Steamship SINGAPORE TRADER and China Marine Investment Co., Ltd. and China Overseas Navigation Co., Ltd., Plaintiffs, for exoneration from or limitation of liability.

SINGAPORE NAVIGATION COMPANY, S.A., CHINA MARINE INVESTMENT CO., LTD., CHINA OVERSEAS NAVIGATION CO., LTD.,

Plaintiffs-Appellants,

MEGO CORP., ET AL., JOSEPH MARKOVITS, ET AL., UNITY SEWING SUPPLY CO., ET AL., INTERNATIONAL SEAWAY TRADING CORP., ET AL., KATONE CORP., ET AL., SPARTAN INDUSTRIES, ET AL., ALSTER IMPORT CO., LO-E MANUFACTURING CORP.,

Cargo Claimants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING ON BEHALF OF PLAINTIFFS-APPELLANTS SINGAPORE NAVIGATION COMPANY, S.A., CHINA MARINE INVESTMENT CO., LTD., AND CHINA OVERSEAS NAVIGATION CO., LTD.

Plaintiffs-Appellants (Shipowner) respectfully request rehearing and reconsideration of this Court's Judgment, Order and Decision dated July 15, 1976 on the ground that the majority of this Court overlooked or misapprehended every prior applicable decision including those of this Court and the Supreme Court, and thus it failed to apply the proper legal standards in determining that the alleged deviation was unreasonable. Specifically, the majority opinion overlooks the following factors which clearly show the deviation, if any, was *not* unreasonable:

(1) the reasonable basis for the alleged deviation, namely, the advice the Shipowner received from its agent to proceed to Detroit (where the cargo could definitely be timely discharged), which advice was based on information the Valleyfield stevedoring company gave to the Shipowner's Canadian sub-agent that Valleyfield was congested, long delays could be expected, and shed space was not available;

(2) the Shipowner's exercise of a "deliberate and considerate judgment" based on the information and advice he thus received; and

(3) the motive further justifying the alleged deviation —to benefit cargo by avoiding the predicted long delays at Valleyfield and all other Canadian ports and thereby to accomplish the overriding commercial purpose of the voyage—delivery of the cargo in New York for the Christmas market.

Furthermore, we respectfully submit that the majority opinion misapprehends the applicable law by:

(4) imposing on the Shipowner's agents the excessive burden of making an "effective" (apparently meaning "error-free") investigation of Valleyfield's possibilities when the proper test is whether under the existing circumstances they made a reasonable and good faith investigation as a matter of foresight (which they clearly did); and

(5) if limitation of liability is applicable at all, mistakenly denying the Shipowner limitation of liability for an act (the investigation of Valleyfield's possibilities) which, if negligent at all, was merely negligence of the Canadian sub-agents rather than the Shipowner.

At the outset, the majority of this Court posed two questions: "(1) was there a deviation and (2) if so, was it unreasonable?" (Slip Opinion, 5022)

Both questions were answered "yes" apparently merely because the ship went to the nearby U.S. port of Detroit instead of to the non-U.S. port of Valleyfield. If this were the proper test, no deviation could ever be "reasonable". COGSA 46 U.S.C. § 1304(4).

We respectfully submit that all of the Court's reasoning concerning the failure to use Valleyfield (5022-5028) properly deals only with the first question of whether there was a deviation. The District Court made the same error —which was generated by the mistaken arguments submitted by the cargo owners (appellees).

We further respectfully submit that the majority of this Court overlooked or misapprehended the applicable law on the second question of whether the deviation was reasonable or unreasonable.

The Proper Test

In *Irwin Feuer* v. *Booth Steamship Company,* 195 F.2d 529-1 (2 Cir. 1952), affirming *American Cyanamid Co.* v. *Booth Steamship Company,* 99 F. Supp. 232, 237 (S.D.N.Y. 1951), this Court approved the following test for determining whether a deviation occurred and, if so, whether it was reasonable:

"The true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the

> time, including the terms of the contract without obligation to consider the interests of any one as conclusive." [Deviation benefiting cargo held reasonable.]

See also *The Styria*, 186 U.S. 1, 9, 10, 13, 15, 22 (1902) and the many other cases cited in the Shipowner's Brief, pp. 21-39—all in accord and none applied by the majority in the cause at bar. Under the proper legal standards followed in the foregoing decisions, in determining whether a deviation has occurred, the courts *must* consider:

(a) *all* the terms of the contract;

if there was a deviation, *then* to determine whether it was unreasonable, the courts *must* consider:

(b) the interests of *all* parties concerned;

(c) the motive for the alleged deviation—whether to benefit the shipowner, or cargo or both jointly—and whether the commercial purpose of the transaction was to be achieved; and

(d) whether the shipowner exercised a deliberate and considerate judgment based on the contemporaneous information available to him—

all as measured against the shipowner's COGSA duty to properly care for the cargo, 46 U.S.C. § 1303(2). The dissent correctly recognized that the two questions (whether there was a deviation and, if so, was it unreasonable) must be answered on different grounds; and we respectfully submit, it applied the proper test to the second question and reached the proper conclusion, that here no unreasonable deviation occurred.

There Was No Deviation

Every "deviation" case arises because the ship does not go to the contract port of discharge or because it allegedly departs in some way from the contract voyage. The cargo owners always contend that the ship should have complied "strictly" with the terms of the contract [unless it is to

their advantage to do otherwise, see *Crelinsten Fruit Company* v. *The MORMACSAGA* [1968] 2 Lloyd's List 184 (Canada)—shipowner held liable to cargo for *not* deviating].

Here, the handstamp on the bill of lading provided that the ship "will" go to the nearest non-U. S. port in the event of a longshoremen's strike on the East Coast of the United States—while printed Clause 5 permitted discretion to avoid anticipated delays.

We respectfully submit that, in concentrating on the issue of whether the handstamp was "superseding" or "conflicting" or "overriding," both the District Court and the majority overlooked the real point that all the clauses must be reconciled with the shipowner's COGSA duty to properly care for the cargo. With or without the clauses, the shipowner's actions must be "reasonable."

Here the Shipowner was informed that he could expect long delays at all Canadian ports. At the suitable major ports of Halifax, etc. he could expect labor problems, while at the minor ports he could expect delays due to congestion, inadequate shed space and inadequate facilities. No deviations were found with respect to any of the major Canadian ports. Obviously the Shipowner exercised reasonable discretion under COGSA (and Clause 5) to avoid the anticipated long delays at the major ports. The facts show he also exercised reasonable discretion to avoid the predicted long delays at the very small port of Valleyfield. Thus no deviation occurred. *A fortiori,* as discussed below, if there was a deviation, it was reasonable.

If There Was a Deviation It Was Not Unreasonable

If there was a deviation it was not unreasonable under the circumstances, as the information obtained by the Shipowner's agents after a reasonable investigation of Valleyfield indicated that Valleyfield would not be as reliable as Detroit for effecting discharge and timely on-carriage to New York.

The essence of the majority's views on the facts and law leading to their conclusion that the deviation was unreasonable is stated thus:

> "But apparently Valleyfield as a possibility *never* entered the minds of the Shipowner or its agents—at least as a feasible port for cargo discharge. *Thus, if fault there be, attributable to the Shipowner or its agents, it would be that no effective investigation of Valleyfield's possibilities was made. If such were made, it is not revealed in the record.* The agents assured themselves of the unavailability of the many ILA ports; *probably Valleyfield was passed over as having inadequate facilities.*" Pages 5024-5025, Slip Opinion. (Emphasis added.)

We most respectfully submit that the foregoing statement clearly indicates that the majority (probably misled by Appellees' Brief*) has overlooked facts established by District Court findings or, in the absence of a finding, by uncontradicted evidence.

It is clear that Valleyfield *was* investigated as a feasible port for discharge. The Shipowner's New York port agent, Mr. Herlihy of Gannet Freighting, Inc., investigated** the availability and adequacy of the nearby Canadian ports (148a-152a).*** Herlihy necessarily relied on the advice of a reputable Montreal steamship agent, Colley Motorships Ltd. Both Honegger (291a-292a) and Paulsen (346a-349a) of Colley testified that Colley investigated a number of Canadian ports—including Valleyfield. Paulsen testified that he personally called Milton at Valleyfield with the following results:

---

* Appellees' Brief in this Court consisted largely of factual contentions from their Brief after Trial which had been rejected by the District Court.

** The facts of the investigation including Valleyfield are outlined in the Shipowner's Brief, pp. 8-17 and 37-39 and in its Reply Brief.

*** Pages suffixed with "a" refer to the Joint Appendix.

"Q. To whom did you speak in Valleyfield?
A. Mr. Doug Milton.

Q. What company is he with?
A. Valleyfield stevedoring company.

Q. What questions did you ask him?
A. Whether it would be possible to discharge there, laborwise, also spacewise.

Q. What answer did he give?
A. He said it would be possible. *The port is very congested. Probably expect a long waiting time, and also shedding space is not available.*" (348a-349a) (Emphasis added.)

As a result of the information received from Paulsen and Honegger of Colley Motorships (150a-152a), Herlihy by telex dated October 6, 1971 (Exhibit 13X) recommended to the Shipowner that the ship go to Detroit rather than use any Canadian port. The telex stated in material part:

• • •

"Insofar as Canadian ports are concerned, our agents have advised *again* that any suitable port such as St. John, Halifax, Montreal, will not accept the vessel on account of union problems. *Other smaller Canadian ports who don't have union problems are hopelessly inadequate in warehouse space, transit facilities, etc.*" (Emphasis added.)

• • •

In finding that Valleyfield "was congested" (119a), the District Court clearly accepted Paulsen's evidence and rejected the evidence of Milton of Valleyfield on that point. Thus it is clear that the District Court recognized at least that Paulsen had inquired about Valleyfield and was told that it was congested. Further, Milton did not dispute Paulsen's testimony regarding their conversation. Milton merely said he could not recall the conversation and specifically admitted that he could not say the conversation did not take place (445a). Thus, Paulsen's affirmative and

specific testimony that Milton told him that Valleyfield was "congested" and to "expect a long waiting time and also shedding space is not available" at Valleyfield is entirely uncontradicted.

It was on the basis of *that* investigation and the reports stemming from it, by Colley Motorships to Gannet and by Gannet to the Shipowner, that the SINGAPORE TRADER was instructed to proceed to Detroit. The District Court found that Gannet made good faith efforts to ascertain conditions in Canada and acted reasonably in reporting to its principal (120a). Surely, Paulsen's uncontradicted testimony, describing his inquiry at Valleyfield and the answer he received, demonstrates that, contrary to the majority's assumption, Valleyfield's possibilities were in fact investigated and reported on in a reasonable and prudent manner.

Moreover the agents' evaluation was reasonable. On their information, after investigation, long delays could be anticipated at Valleyfield although it was "possible" to discharge there. On the other hand, as the majority has stated, Detroit was "ready, able and willing to receive the TRADER" (5023). In the situation facing the Shipowner, Detroit offered the one essential quality that Valleyfield lacked—*reliability* in the sense that timely discharge could be effected there without question, whereas the information on Valleyfield indicated probable long delay or, at the very best, substantial uncertainty. Faced with those alternatives as a matter of foresight the better choice was clear: to proceed to Detroit where timely discharge was certain. Unquestionably, that decision was reasonable.

Why then did the District Court conclude that the deviation was unreasonable and the majority affirm? We submit it was simply because the District Court decided as a matter of hindsight on the basis of evidence* adduced dur-

* The evidence was Milton's testimony (440a-442a) which was based on improper leading questions by Cargo's attorney (Mr. Maloof) over objections from Shipowner's attorney (Mr. Bowles). Moreover, when Milton testified, long after the incident, he had no

ing the trial almost three years later that Valleyfield was available for cargo discharge (Finding 9); but it never properly addressed the question whether the Shipowner's agents' investigation and conclusion were reasonable. The majority here, we submit, fell into the same error by stating that fault, if any, "would be that no *effective* investigation of Valleyfield's possibilities was made" (supra, p. 5; emphasis added). Thus, in addition to overlooking the fact an investigation had been made, the majority view would impose on the Shipowner the absolute burden at his peril that the investigation accomplish its intended purpose, i.e., be "effective", apparently meaning "error free". We submit that is patently not the law.

Thus, we respectfully submit, this Court should have decided this appeal on all the following considerations:

(1) The Shipowner's agents' good faith investigation of the possibility of using Canadian ports—including Valleyfield—was reasonable and resulted in information that it was congested and long delays could be expected. (Discussed above.)

(2) Detroit was clearly ready, able and willing to take the TRADER. (Slip Opinion 5023.)

(3) There was no "economic convenience" to the Shipowner in using Detroit nor were there any unusual risks or perils to the cargo in using the St. Lawrence Seaway (fn 3 p. 5026). [There was economic *inconvenience* because of the longer voyage.]

(4) The Shipowner chose to go to Detroit solely to avoid predicted long delays at all Canadian ports —a decision which benefited cargo—and which decision was based on the advice of reputable local businessmen (including the Canadian agent Col-

---

contemporaneous records to show the daily status of the two sheds at Valleyfield in October 1971 (452a), the larger of which his company did not control (442a). Accordingly, his testimony depended entirely upon his unassisted recollection and should be given no weight.

ley, which lost a substantial fee in recommending against the use of any Canadian port, 354a-357a).

(5) Accordingly, Detroit appearing more reliable on the basis of a reasonable investigation, it was *not* unreasonable to send the ship there.

We respectfully ask the majority of this Court to reconsider in light of the above and ask:

With definite information that Detroit was ready, able and willing to discharge the TRADER and information *after investigation* that Valleyfield was congested and long delays could be expected, were the Shipowner and its agents unreasonable in deciding to send the ship to Detroit merely because of the handstamp provision?

We respectfully submit that, reasonably considered, this question answers itself. No!

Clearly the Shipowner reasonably investigated the situation and considered the alternatives. He made a "deliberate and considerate judgment" to use Detroit based on all the *then* available facts.* His judgment need not be "infallible". *The Styria*, *supra*, 186 U.S. 9-10; and as in many prior adjudicated cases, if the deviation benefited cargo, the motive was proper and the deviation was not unreasonable. *Booth Steamship*, *supra*, p. 2.

Limitation of Liability

The District Court found no fault with the investigation of alternate ports made by the shipowner's port agents, and it clearly was a reasonable investigation. But if there was any fault (which is denied), it was solely that of the

* Although the District Court found that Valleyfield "was congested", and "less efficient" than Detroit, he substituted his own business judgment for that of expert businessmen, in holding that the ship unreasonably deviated in not using Valleyfield. This was improper hindsight. Cf. *Badhwar* v. *Colorado Fuel and Iron Corp.*, 138 F. Supp. 595, 612 (S.D.N.Y. 1955), aff'd 245 F.2d 903, 906 (2 Cir. 1957) and *Esso Standard Oil, S.A.* v. *SS Gasbras Sul*, 387 F.2d 573, 578, 580 (2 Cir. 1968).

Canadian port agent Colley Motorships Ltd.—which is not a general agent or a managing agent or an officer of the Shipowner. Certainly no personal fault or "privity or knowledge" exists on the part of the Hong Kong shipowner in this case in which he relied on reputable local businessmen to investigate and advise him on local Canadian conditions. Thus, in any event, the Shipowner is entitled to limitation of liability under 46 U.S.C. § 183. (See authorities cited pp. 45-49 Shipowner's Brief.)

CONCLUSION

The present decision is contrary to every prior decision on the meaning of the term "reasonable deviation" under COGSA 46 U.S.C. § 1304(4). If it is not reversed, the law on the subject will be thrown into great confusion.

It is therefore respectfully requested that this Court grant this petition and on rehearing change its decision and reverse the judgment below to hold that the diversion of the SINGAPORE TRADER to Detroit, considering all the circumstances, and the proper legal standards, was not an unreasonable deviation.

We respectfully suggest that the matter be reheard *in banc.*

Dated: August 13, 1976

Respectfully submitted,

KIRLIN, CAMPBELL & KEATING
Attorneys for Plaintiffs-Appellants
Singapore Navigation Company, S.A.,
China Marine Investment Co. Ltd.
and China Overseas Navigation Co., Ltd.

LAWRENCE J. BOWLES
RICHARD H. BROWN, JR.
Of Counsel

CERTIFICATE OF SERVICE
OF PETITION FOR REHEARING ON BEHALF OF
PLAINTIFFS-APPELLANTS

We hereby certify that two copies of Petition for Rehearing on Behalf of Plaintiffs-Appellants were this day served by hand on the following:

DONOVAN, MALOOF, WALSH & KENNEDY
Attorneys for Claimants Mego Corporation, et al.
161 William Street
New York, New York 10038

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN
Attorneys for Claimants Joseph Markovits, Inc., et al.
96 Fulton Street
New York, New York 10038

WOFSEY, CERTILMAN, HAFT, SNOW & BECKER
Attorneys for Claimants Unity Sewing Supply Co., et al.
55 Broad Street
New York, New York 10004

CICHANOWICZ & CALLAN
Attorneys for Claimants International Seaway Trading Corp.
and Ogdensburg Bridge & Port Authority
80 Broad Street
New York, New York 10004

BIGHAM, ENGLAR, JONES & HOUSTON
Attorneys for Claimants Katone Corporation, et al.
99 John Street
New York, New York 10038

CHARLES J. MEYERS, ESQ.
Attorney for Claimants Spartan Industries, etc.
450 West 33rd Street
New York, New York 10001

LILLY, SULLIVAN & PURCELL
Attorneys for Claimant Alster Import Co.
17 Battery Place
New York, New York 10004

REICHBART & REICHBART
Attorneys for Claimant LO-E Manufacturing Corp.
41 East 42nd Street
New York, New York 10017

August 13, 1976

KIRLIN, CAMPBELL & KEATING

By Lawrence J. Bowles
Lawrence J. Bowles
Attorneys for Plaintiffs-Appellants